Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, AND CAMILLE ELIZABETH WEBB SEWELL, PETITIONERS

v.

THE CITY OF DALLAS, TEXAS, THE CITY OF DALLAS PARKS & RECREATION DEPARTMENT, THE CITY OF DALLAS PARKS & RECREATION BOARD, and PAUL DYER, DIRECTOR, CITY OF DALLAS PARKS & RECREATION DEPARTMENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals exceed its *Erie* authority by creating Texas law relative to complex and unsettled real estate law issues and deed interpretation, and Texas Probate law, with regard to descent and distribution and will construction?

2. In this diversity action brought in the Northern District of Texas, governed by Texas law, should the Court of Appeals have certified the decisive issues of law upon which the case was decided to the Supreme Court of Texas, pursuant to Texas' statutory certification procedure, to permit the Supreme Court of Texas to decide whether the Court of Appeals' decision, based on two novel rules of deed and will construction, would become the law of Texas, in a situation where Texas' interests are vital and paramount?

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NO._____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2005

ANN TENISON HEREFORD WEBB, ET AL
Petitioners,

vs.

THE CITY OF DALLAS, ET AL

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, **ANN TENISON HEREFORD WEBB, LIZANN TENISON WEBB, BYRON JAMES WEBB, AND CAMILLE ELIZABETH WEBB SEWELL,** respectfully request that a writ of *certiorari* be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court for the Northern District of Texas, Dallas Division.

OPINIONS BELOW

The Court of Appeals affirmed the Judgment of the United States District Court for the Northern District of Texas, Dallas Division, on August 17, 2005. (App. 1a). Petitioners timely filed a Petition for Rehearing on August 30, 2005. The Court of Appeals denied the Petition for Rehearing on November 10, 2005. (App. 11a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254. The district court had jurisdiction of the case pursuant to 28 U.S.C. Section 1332(a).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. § 1332(a):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

Vernon's Ann.Texas Const. Art. V, § 3-c

Jurisdiction to answer questions of state law certified from federal appellate court

Sec. 3-c. (a) The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court.

(b) The supreme court and the court of criminal appeals shall promulgate rules of procedure relating to the review of those questions.

Texas Rule of Appellate Procedure 58:

58.1. Certification

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

TEX. PROBATE CODE ANN. § 3(o) (Vernon 1980):

§ 3. Definitions and Use of Terms

Except as otherwise provided by Chapter XIII of this Code, when used in this Code, unless otherwise apparent from the context:

...

(o) "Heirs" denote those persons, including the surviving spouse, who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate.

TEX. PROBATE CODE ANN. § 38 (Vernon 1980):

§ 38. Persons Who Take Upon Intestacy

(a) Intestate Leaving No Husband or Wife. Where any person, having title to any estate, real, personal or mixed, shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the

following course:

1. To his children and their descendants.

...

STATEMENT

Petitioners, Ann Tenison Hereford Webb, Lizann Tenison Webb, Byron James Webb, and Camille Elizabeth Webb Sewell (collectively the "Webbs") appealed the district court's take-nothing judgment with respect to their claims against the City of Dallas. The Webbs asserted that the City violated conditions contained in deeds conveying property to the City which provided:

> "And if said property, or any part thereof, shall not be used by said City, or its successors as such municipal corporation, for the purposes of a Public park, or if said property, or any part thereof, shall be used for any purpose other than public park purposes as above provided for, or should the name of said park be changed from that above designated, then and in each such event the right and title of the City of Dallas to the property hereby granted shall cease, and said property and all right and title thereto shall at once revert to and vest ***in us or our heirs***, and it shall be lawful for ***us or our heirs*** to re-enter upon, take, repossess and enjoy all and singular the property hereby granted as in our former estate." [Emphasis added].

Petitioners alleged that they were "heirs" under the deeds and under Texas state law. A jury found to the

contrary, and the district court entered judgment based on this jury finding.

The factual background of this case is set forth at length in a prior opinion of the Court of Appeals. *See Webb v. City of Dallas*, 314 F.3d 787, 788-90 (5th Cir.2002)(on interlocutory appeal)["*Webb I*"]. (App 23a).

The crux of Petitioner's appeal, germane to this Petition, was the propriety of the district court's submission of Question One to the jury. Question One (App. 17a) inquired whether the Webbs "prove[d] that in the Tenison Deeds, the grantors, Edward O. and Annie M. Tenison, clearly intended to refer to the [Webbs] by the use of the word 'heirs'?" The court instructed the jury to answer "Plaintiffs did prove," or "Plaintiffs did not prove." In the event that the jury chose the latter answer, they were instructed to stop and answer no further questions. Following seven days of deliberations, the jury answered Question One by marking "Plaintiffs did not prove." Upon consideration of the verdict, the court entered a take-nothing judgment against the Webbs.

The Court of Appeals found that the district court committed plain error by submitting Question One to the jury. (App. 7a). Yet, the Court went on to determine, *sua sponte*, that the property interest created by the Tenison Deeds created a fee simple interest in the land subject to a condition subsequent that the City maintain the property as a public park. Thus, the Court concluded, without citation to any controlling Texas authority: